STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

vs.

No. ~~12355,123801~~ 123553-6

NICHOLAS HOLTSCHLAG, JOSHUA COLE
DANIEL BRAYMAN, ERICK LIMMER

Defendants-Appellees.

Wayne County Circuit Court No. 99-004731

APPELLANT'S BRIEF

ON APPEAL

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Table of Contents

TABLE OF AUTHORITIES

STATE CASES

STATE CASES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This Court's jurisdiction arises from MCL 770.12, and MCR 7.301-302.

The defendants Brayman, Cole and Holtschlag were convicted of involuntary manslaughter and defendant Limmer was convicted of accessory after the fact of manslaughter. On March 23, 2003, the Court of Appeals reversed these convictions. This Court granted the People's application for leave to appeal on July 3, 2003.

STATEMENT OF QUESTION

I.

An unlawful act committed with the intent to injure or in a grossly negligent manner that proximately causes death is involuntary manslaughter. Here the Court of Appeals held only an unlawful act *not amounting to a felony* or a *lawful* act done in a grossly negligent manner can constitute manslaughter – causing death by doing an unlawful act that is a *felony*, but without malice, being no unlawful homicide at all. Since the prosecutor proved the defendants acted in a grossly negligent manner causing a death (though the act was a felony), should this Court correct these fundamental misapprehensions of the law of homicide and reinstate the defendants' convictions?

The People answer: YES
The defendants answer: NO.

STATEMENT OF FACTS

The facts here presented are taken from the Court of Appeals opinion.[1]

"On Saturday, January 16, 1999, defendants Holtschlag and Brayman picked up three young women, Samantha, Melanie, and Jessica and took them to defendant Limmer's Grosse Ile apartment to watch television and drink alcohol. Defendants Limmer and Cole were at the apartment when the girls arrived and provided each girl with a beer. Shortly thereafter, defendant Limmer gave the group a bag of marijuana and then went into his bedroom.

"Later in the evening, defendant Cole asked the girls if they wanted anything more to drink and then went into the kitchen with defendants Holtschlag and Brayman. Melanie testified that she saw these three defendants in the kitchen smoking marijuana and talking. When defendants left the kitchen, defendant Holtschlag gave Samantha a Mountain Dew and defendant Brayman gave Melanie a Screwdriver. Samantha complained that her drink tasted "gross." Shortly after consuming these beverages, Samantha and Melanie passed out and began vomiting. Before passing out, Melanie recalled one of the boys asking if Samantha had a pulse. Both Melanie and Samantha had to be carried into the bathroom. They were placed on their sides to prevent choking.

"After being apprised of the girls' conditions, defendant Limmer told the other defendants to clean up the mess made by the girls and sent defendant Holtschlag to purchase a vacuum and carpet cleaner at a nearby store. There was evidence that the girls appeared pale and that Samantha sounded like she was have trouble breathing. Jessica testified that defendant Limmer asked defendant Cole to check Samantha's pulse but that defendant Limmer would not let them call an

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[1] Appendix 15a-17a.

ambulance. The two girls were sick for several hours before they were taken to the hospital. Defendant Limmer did not go with the other defendants and Jessica to the hospital. Rather, Jessica recalled that he stayed behind and repeatedly warned them not to mention being at his apartment. Defendant Brayman claimed that defendant Cole informed him right before they left for the hospital that he had drugged the girls.

"When Samantha and Melanie arrived at the hospital, both were unconscious and Samantha was not breathing. In response to questioning by police and hospital personnel, defendants Holtschlag, Brayman, and Cole claimed they were at a party in Ecorse and did not say anything about drugs. In fact, these defendants drove with a police officer to show him where the alleged "Ecorse party" occurred. Samantha died as a result of her injuries and Melanie was in a coma for several hours. Blood and urine samples revealed high concentrations of GHB in the girls' systems. Several experts testified that the levels of GHB present were sufficient to cause Samantha's death and the symptoms experienced by Melanie.

"Defendant Cole subsequently admitted to police that he went with defendant Limmer to purchase a substance from a man outside a gas station in Dearborn.[2] Upon returning to the apartment, defendant Cole stated that defendant Limmer poured twenty ounces of this substance into a glass container. He claimed that defendant Limmer told him that the substance would eat through a plastic container. Defendant Cole confessed to police that he literally poured this substance in all three of the girls' drinks. According to defendant Cole, defendants Brayman and Holtschlag were aware of this and acquiesced in the plan."

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[2] Footnote 5 omitted.

The Court of Appeals held:

> After reviewing the record, we find that there was sufficient evidence to support defendants' convictions for mixing a harmful substance in a drink and possession of GHB. However, we conclude that there was legally insufficient evidence to support defendants' convictions for involuntary manslaughter and accessory after the fact to manslaughter.

ARGUMENT

I.

An unlawful act committed with the intent to injure or in a grossly negligent manner that proximately causes death is involuntary manslaughter. Here the Court of Appeals held only an unlawful act *not amounting to a felony* or a *lawful* act done in a grossly negligent manner can constitute manslaughter – causing death by doing an unlawful act that is a *felony*, but without malice, being no unlawful homicide at all. Since the prosecutor proved the defendants acted in a grossly negligent manner causing a death (though the act was a felony), this Court should correct these fundamental misapprehensions of the law of homicide and reinstate the defendants' convictions.

Standard of Review

In *People* v *Wolfe*,[3] this Court reaffirmed the vitality of the standard of review announced in *People v Hampton*,[4] that an appellate court "must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt."[5] The *Wolfe* Court noted "that when an appellate court reviews the evidence supporting a conviction, factual conflicts are to be viewed in a light favorable

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[3] *People v Wolfe*, 440 Mich 508 (1992).

[4] *People v Hampton*, 407 Mich 354, 366 (1979).

[5] *Wolfe, supra*, at 513-514, quoting from *Hampton*.

to the prosecution." The construction of a statute–here, the meaning of "manslaughter"–is a question of law, reviewed *de novo*.[6]

Argument

The defendants challenged the evidentiary sufficiency of their convictions. The Court of Appeals reversed the defendants' convictions, not for evidentiary insufficiency, but based on its newly created doctrine of legal over-proof. The court found in the oft-repeated definition of involuntary manslaughter – "...the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony...." – a legal element unsatisfied by the prosecutor. That is, the court found the prosecutor, in proving the defendants mingled a harmful substance in Samantha Reid's drink, proved a felony and, thereby failed to prove an act "not amounting to a felony." And given the second part of the *Ryczek*[7] refrain – "negligently doing some act lawful in itself..." – the court found additional fault with the prosecutor: by proving the *felony* of poisoning, he failed to prove the defendants committed a *lawful* act in a grossly negligent manner, so neither could a conviction stand for gross negligence manslaughter. Distracted by these descriptive phrases, the court apparently was unconcerned that the defendants were charged with, and the jury was instructed on, only gross negligence manslaughter. The result in this case – that the defendants are excused for their homicide – is untenable, but it is the product of the continued confusion and linguistic imprecision that pervades the law of manslaughter.

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[6] *People* v *Carpentier*, 446 Mich 19 (1994); *Cardinal Mooney High School* v *Michigan High School Athletic Ass'n*, 437 Mich 75, 80 (1991)

[7] *People v Ryczek*, 224 Mich 106 110 (1923).

I. Manslaughter and Murder Distinguished

Anglo Saxon law recognized only one form of criminal homicide; no distinction was made between premeditated, reckless, or accidental killing, and killing in self-defense. All were labeled homicide and all were punished by death.[8] One can only imagine the cruel toll this ruthless system took on the monarch, in loss of subjects and their economic value, and on communities, measured in fractured families and increased poverty. The harshness of the system was gradually ameliorated when the concept of malice aforethought was created to distinguish murder from other kinds of homicide.[9] Progress abounded and by the time of Bracton intention was everything:[10] "...because

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[8] Stephen, A HISTORY OF THE COMMON LAW OF ENGLAND, (1883), 24-25: "but they [earliest laws] suggest that in every case whatever, even in the case of unintentional homicide, it was *prima facie* lawful, and even proper, to slay the slayer, and as no exception is made excusing the person who exercises this right, a single homicide might lead to an endless blood feud, which perhaps often happened in those days."

[9] Stephen, Id., at 41.

[10] Well, almost everything. Lord Coke wrote four hundred years after Bracton (who wrote from 1250 to 1258 and died in 1267) and according to him any homicide done during the commission of *any* unlawful act was still murder. And apparently Blackstone agreed with that statement. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, IV., 200. About a century and a half later that precept was ameliorated with the misdemeanor-manslaughter rule designed to soften the harshness of Lord Coke's rule. See Moreland, LAW OF HOMICIDE, (1952), 183-195. Thus, an unintentional death that occurred during the commission of a felony was murder and one that occurred during the commission of any other unlawful act was manslaughter and nothing more. Perkins & Boyce, CRIMINAL LAW (3rd ed) 62. Still, not until *People v Aaron*, 409 Mich 672 (1980), was the felony murder rule modernized. This Court focused on the principle that "one is ordinarily not criminally liable for bad results which differ greatly from intended results," thus, requiring a finding of individual culpability before criminal responsibility could be assessed.

a crime is not committed unless the intention to injure exists, It is will and purpose which mark *maleficia*."[11]

That early law still colors the jurisprudence of this State. In Michigan there is a crime called manslaughter, but since it is not defined by statute, the Michigan courts must discover its definition in the common law.[12] At common law all homicide that was not murder and that was not legally justified or excused was considered manslaughter. An additional distinction, that of intention, was made between voluntary manslaughter, an intentional but mitigated murder, and involuntary manslaughter, which covered unintentional killings.[13] The core definition of involuntary manslaughter is that it is an unintentional killing without malice.

> Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.[14]

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[11] Bracton, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, 384, (Thorne Translation, Harvard Online Library, 2003).

[12] *People v Steubenvoll*, 62 Mich 329 (1886); *People v Riddle,* 467 Mich 116 (2002).

[13] And involuntary manslaughter was again divided into gross negligence manslaughter and unlawful act manslaughter, with unlawful act manslaughter being subdivided into those predicate unlawful acts that were *mala prohibita* and those that were *mala in se.*

[14] *People v Datema*, 448 Mich 585, 594-595 (1995), quoting Perkins & Boyce, CRIMINAL LAW (3d ed) 105.

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[14] *People v Datema*, 448 Mich 585, 594-595 (1995), quoting Perkins & Boyce, CRIMINAL LAW (3d ed) 105.

II. Unlawful Act and Gross Negligence Manslaughter

Because at common law any homicide committed during the perpetration of a felony was murder whether or not the death was intended,[15] it was necessary to include in the definition of unlawful-act manslaughter descriptive language to differentiate this less blameworthy unintended homicide from the unintended homicide that was felony murder. So, the counterpart of the felony-murder rule was the so-called misdemeanor-manslaughter rule, which courts and commentators began defining as an unintentional killing caused by doing some unlawful act "not amounting to a felony." The essence of the offense was not that the unlawful act did not amount to a felony – that language was meant only to distinguish involuntary manslaughter from murder.[16] The essential element of involuntary manslaughter is that an act causing unintentional death is done with a measure of culpability. The state of mind is not malice aforethought, which if present would be murder, nor is it blameless accident; it is something in between.

As unlawful-act manslaughter is the lesser counterpart of felony murder, so is gross-negligence manslaughter the lesser counterpart of depraved-heart murder, which is second-degree

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[15] Although Professors Perkins & Boyce note that there is early precedent recognizing that *mens rea* should be considered even in felony-murder circumstances: "If a man by perpetration of a felonious act brings about death of a fellow creature he is guilty of murder, unless when he committed the felonious act the chance of death resulting therefrom was so remote that no reasonable man would have taken it into consideration. In that case he is not guilty of murder, but only of manslaughter." Perkins & Boyce, CRIMINAL LAW (3rd ed) 63, quoting *Regina v Whitmarsh*, 62 Just. P. 711 (1898).

[16] In *People v Pavlic*, 227 Mich 562, 565-566 (1924), this Court recognized that the underlying unlawful act supporting an involuntary manslaughter conviction could be a felony. Pavlic, who argued the unlawful act he committed amounted to a felony warranting a murder conviction only and requiring reversal of his involuntary manslaughter conviction, would have had better luck with the Court of Appeals panel that decided this case.

murder in Michigan. Depraved-heart murder describes an act that is so extremely reckless as to evidence a callous or wicked indifference to human life[17] while the recklessness of gross- negligence involuntary manslaughter is characterized by the actor's failure to appreciate the risk of harm his act might cause; the distinction is one of degree. In sum, all involuntary manslaughter requires proof that the defendant acted in a grossly negligent manner causing the death of another except unlawful act manslaughter with the predicate offense being *malum in se*, which by definition will include a *mens rea*, some level of intent.[18]

A. The Trap of the Semantic Fallacy of the False Affirmative.

When parsing the law of homicide from murder to manslaughter myriad distinctions must be made. Problems occur (most frequently at trial with jury instruction, but occasionally, as in this case, after the fact of judgment) when the descriptive language of academia becomes entangled with core definitions. For example, murder is an unexcused killing with malice. And to distinguish manslaughter from murder it is frequently defined as an unintentional killing *without malice*. But simply because that phrase is used to separate the two offenses does not mean that the distinction

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[17] The requirement for depraved heart murder was that the act be "prompted by, or the circumstances indicate that it sprung from, a wicked, depraved or malignant mind – a mind which, even in its habitual condition, and when excited by no provocation which would be liable to give undue control to passion in ordinary men, is cruel, wanton, or malignant, reckless of human life, regardless of social duty." *Maher v The People*, 10 Mich 212, 218 (1862).

[18] Unlawful-act manslaughter was subdivided into those predicate unlawful acts that were *mala prohibita* and those that were *mala in se*. An offense is *malum prohibitum* when forbidden by statute, but not otherwise wrong. On the other hand *mala in se* offenses are those that would draw wide societal condemnation due to the societal harm caused; they include all felonies, injuries to persons or property, and outrages against public decency. Perkins & Boyce, *supra*, 109. Any offense *malum in se* includes some form of *mens rea*, a wrongful or criminal intent, while that guilty mind is not necessary to a *malum prohibitum* offense, gross negligence suffices.

is transformed into an element requiring that the prosecutor prove the negative, "without malice." Judge Charles Moylan, in his comprehensive treatise on the law of homicide, has elegantly described this trap as the semantic fallacy of the false affirmative.[19] He explains that it became a facile linguistic habit to express a negative in positive terms – the absence of proof of "nighttime" became affirmatively described as daytime. So with the distinction between felony murder and involuntary manslaughter, the absence of a felony supplying the *mens rea* became "not amounting to a felony." But the prosecutor's responsibility is not to prove the absence of a felony, rather it is to prove the commission of a dangerous act which serves to impute culpability.[20] And with gross-negligence manslaughter, the lawfulness of the act is not an element, but rather the degree of negligence that is greater than ordinary negligence and less than that indicative of malice.

III. This Case – The Court of Appeals Entrapped.

That the Court of Appeals walked into the linguistic trap is apparent from its terse, one might say unthinking, treatment of the sufficiency issue in this case. The court did not question the evidentiary sufficiency of the proofs presented by the prosecutor.[21] Instead, it focused on those descriptive phrases used to explain involuntary manslaughter and, completely entangled in the linguistic trap, decreed they should have been proven. The eleven sentences the court devoted to the issue reveal a fundamental misapprehension of the law of homicide. That court's startling

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[19] Judge Charles E. Moylan, Jr., CRIMINAL HOMICIDE LAW, Chapter Twelve, VIII. §12.8.

[20] This is especially true since the *Aaron* decision abolished the felony murder rule and required proof of a culpable mental state, malice aforethought, so the requisite *mens rea* can no longer be supplied by the intention to commit the underlying felony.

[21] In fact, at oral argument a member of the panel stated that the prosecutor should have charged second degree murder.

misstatements of the law employed to justify reversal of the manslaughter convictions – and in the case of defendant Limmer, his accessory after the fact conviction – as well as the unnecessary further harm caused the family of Samantha Reid, demand this Court's immediate attention and correction.

The defendants were convicted of manslaughter under a theory of gross negligence.[22] The theory of prosecution was that they participated in the plan to place GHB surreptitiously in the drinks of three girls, and that the drug caused the death of one, Samantha Reid. The act of placing the drug in the drink is itself a felony, and the defendants were convicted of this crime as well. The "logic" of the Court of Appeals analysis, contained in several sentences, may be set forth in a syllogism:

> *Major Premise:* Manslaughter by gross negligence is committed by "negligently doing some act lawful in itself."[23]
>
> *Minor Premise:* "Mingling a poison/harmful substance in a person's drink is clearly an act unlawful in itself and is in fact...a felony."[24]
>
> *Conclusion:* Therefore, "because mingling a harmful substance is an unlawful act, defendants could not be convicted of involuntary manslaughter under a theory of gross negligence."[25]

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[22] Though the Court of Appeals referred to the convictions as for "involuntary manslaughter," there is no such crime. The offense is manslaughter, and there are various methods by which the offense is shown. One theory or method of proof of manslaughter is commonly referred to as "voluntary manslaughter" and another as "involuntary manslaughter," but these are simply legal theories by which the offense of manslaughter may be shown, not separate statutory offenses. See MCL 750.321.

[23] Slip opinion at 6, quoting *People v Datema*, 448 Mich 585, 596-597 (1995); Appendix 19a.

[24] Slip opinion at 7; Appendix 20a.

[25] Slip opinion at 7; Appendix 20a.

The court thus held that doing a lawful act in a grossly negligent manner so as to cause death constitutes the crime of manslaughter, but doing an *unlawful* act in a grossly negligent manner – but not with wanton and wilful disregard of the likelihood of the probability of death or great bodily harm so as to constitute murder – is not a homicide at all. The mere articulation of the proposition reveals its absurdity. The court's major premise is mistaken, for "doing some lawful act" is a *limitation* on that which the prosecution must prove, not an *element* – the prosecutor *need not* show that the act that caused death was lawful in itself, but neither is the prosecutor *defeated* if in fact the proofs show that the act that caused death, which was committed in a grossly negligent manner, *was* itself unlawful (even felonious). The court's opinion is oxymoronic – the prosecution is held to have had too *little* evidence (the evidence is insufficient for conviction) because it has too *much* evidence. Again, the absurdity of the proposition leaps from the page. A simple example also demonstrates the point. Under the view of the Court of Appeals a person licensed to drive who drives 90 miles an hour in a 25 mile-per-hour residential area and strikes and kills a pedestrian could be convicted of manslaughter, because performing a lawful act – driving – in a grossly negligent manner. But if that same person were unlicensed, then because that conduct was "itself unlawful" the death would be no homicide at all. That the Court of Appeals did not understand that proof of an unlawful act does not defeat a manslaughter prosecution brought on a theory of gross negligence is startling.

The error of the Court of Appeals is also made plain by the very authority – and the only authority – cited by the court in reaching its conclusion, and cited by the court only for a general

definition of manslaughter. In citing *People v Datema*[26] the court not only failed to understand that the "lawful act" language of the court is, historically understood, a limitation on the proofs required and not an element of gross-negligence manslaughter, but failed to consider the rest of the opinion. This Court in that case also flatly said:

> An *unlawful act* committed with the intent to injure *or in a grossly negligent manner* that proximately causes death *is involuntary manslaughter*.[27]

Datema directly contradicts the Court of Appeals holding.[28] Moreover, there this Court succinctly stated the general proposition of law that

> [E]very unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.[29]

The error of the Court of Appeals is clear. Its decision begs for reversal.

The Court of Appeals also ignored a venerable case from this Court directly on point. In the case of *People v Austin*,[30] this Court focused upon intent because it was distinguishing first degree murder by poisoning from involuntary manslaughter. But because the facts of *Austin* are

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[26] *People v Datema*, 448 Mich 585 (1995).

[27] *Datema*, at 606 (1995) (emphasis added).

[28] See also *People v Meyer*, 46 Mich App 357 (1973), where the court of appeals held that the commission of an unlawful act (the injection of heroin into the victim without the intent to kill) in a reckless manner is manslaughter.

[29] *Datema*. At 595. See Perkins, *Criminal Law* (2d ed. 1969) page 70.

[30] *People v Austin*, 221 Mich 635 (1923).

indistinguishable from the facts of this case, the case is instructive for its conclusion that the jury should have been instructed on involuntary manslaughter, given the evidence presented .

Nineteen-year-old Austin and his pal had stolen money from their sometime-employer-victim who threatened to have them arrested. The two went to the victim's home at his request and decided to get even with him. Austin got some poison from the barn, mixed it with whiskey and put it in a beer bottle. They asked the victim whether he wanted a drink and showed him where the bottle was in his kitchen cupboard. The victim drank about a cupful, went into the next room, sat down and apparently fell asleep, never to awaken. The boys were charged with first degree murder by means of poison.

The Michigan Supreme Court analyzed the testimony presented at trial in light of the fact that Austin and his codefendant denied the truth of the confessions, offered by the prosecution as theirs. Noting that the defendants gave the same beer bottle and its contents to two of their friends (who did not drink) with no motive to harm them, and considering Austin's statement that the old man would come out of his drunkenness, the Supreme Court concluded that these two facts constituted evidence of something less than a premeditated intent to kill. The *Austin* Court summed up: "But where it [poison] is not so administered [with malice], and where death as a result is so remote a contingency that no reasonable person could have taken it into consideration when administering the poison and could not have contemplated that death would result therefrom, the homicide is manslaughter only."

In this case, as in *Austin*, the fact that the defendant did not know that because of his act of poisoning Samantha Reid's drink she was reasonably likely to suffer serious injury is not relevant to the question of gross negligence. And this defendant was grossly negligent; he acted recklessly

and with indifference to the possible result of his devious drugging of his victims. And yet the Court of Appeals did not discuss *Austin*, though it was argued extensively in the People's brief.

In this case, the prosecution did not proceed on a theory of unlawful-act manslaughter – though it might have – the Court of Appeals, in finding the evidence insufficient to convict of manslaughter, discussed this theory of manslaughter, and again its misunderstanding of the law is jarring. Once again a syllogism captures its ruling:

> *Major premise*: An unlawful fact *not amounting to a felony* causing death is manslaughter.
>
> *Minor premise:* The defendants committed an unlawful act *amounting to a felony*, causing death.
>
> *Conclusion:* Because the defendants committed a felony, "it would be impossible, as a matter of law, to find them guilty under the misdemeanor-manslaughter rule."[31]

To the People's contention at oral argument, in response to a question, that there are no negative elements, and proof that the unlawful act is not a felony is not necessary to proving this theory of manslaughter, the opinion responds that the prosecution "fails to admit that it provided affirmative evidence that a felony was committed."[32] The People are at a loss to understand what this emphasis on "affirmative evidence" of a felony means, other than that the People do not "admit" that unlawful-act manslaughter requires proof that the unlawful act was a misdemeanor and not a felony. And in

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[31] Slip opinion at 7; Appendix 20a.

[32] Slip opinion at 7; Appendix 20a.

point of fact it does *not*, for, as this Court has said, there are no negative elements.[33] While the People *could* have proceeded on an unlawful-act theory here under *Datema* – the act of placing a harmful substance in someone's drink being an act dangerous to human life, so that a showing of the unlawful act and causation, without a showing of gross negligence, would have been sufficient proof of the crime – because unlawful-act manslaughter is, as the *Datema* opinion reveals, a complex area of the law, and because the People did *not* proceed on that theory in this case, suffice it to say that the Court of Appeals erred grievously in holding that the unlawful-act theory of manslaughter is *defeated* if the proofs show that the unlawful act was a felony.[34]

Finally, it is apparent after the *Mendoza*[35] decision that manslaughter is a lesser included offense of murder and, therefore, the Court of Appeals suggestion at oral argument that second degree murder would have been an appropriate charge here reveals that the evidence was sufficient on manslaughter.[36]

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[33] "Elements are, by definition, positive. A negative element of a crime is a contradiction in terms." *People v Doss*, 406 Mich 90, 99 (1979) ("lack of malice" not an element of manslaughter).

[34] This holding by the Court of Appeals fails to take history into account. As previously stated, at the common law, *any* death during the course of *any* felony was murder, without an independent showing of malice, a rule now abrogated in Michigan. But if any death during the course of any felony was murder, in order to *distinguish* manslaughter from murder the common-law referred to a death during an unlawful act *not amounting to a felony*. But this does not mean that the prosecution can "overprove" its case if it shows a felony (giving the defendant a windfall acquittal) and, since a killing during the course of any felony is no longer murder, malice being required, it of course makes sense that a killing during a felony committed in a grossly negligent manner, not amounting to wanton and willful disregard for murder, is manslaughter, rather than no homicide at all, as the Court of Appeals has said here.

[35] *People v Mendoza*, __ Mich __ (No. 120630, June 20, 2003).

[36] See also *People v Wilson*, 84 Mich App 636 (1978), where the Court of Appeals vacated a felony-murder conviction and remanded for entry of a judgment of conviction of

The Court of Appeals has erred grievously in reversing the manslaughter convictions and the accessory after the fact conviction. For the sake of the law and the family of the victim, that error must be set aside.

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manslaughter because the jury was erroneously instructed on the definition of malice. Noting that the jury's verdict was for murder, but it could not have found malice on the improper instruction, the court reasoned the proofs supported conviction on the lesser offense of manslaughter even though the felony rather than an act "not amounting to a felony" was obviously proved.

Relief

WHEREFORE, this Court should reverse the Court of Appeals and reinstate the defendants' convictions.

Respectfully submitted,

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